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16
17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 SAN JOSE DIVISION
20

21 CRYOTECH INTERNATIONAL, INC. a
22 Delaware Corporation, fka VBS
23 INDUSTRIES INCORPORATED,

24 Plaintiffs,

25 vs.

26 TECHNIFAB PRODUCTS, INC., an
27 Indiana Corporation; and DOES 1-50
28 inclusive,

Defendants.
_____ /

Case No. C08 02921 HRL

Complaint filed: June 12, 2008

**ANSWER OF DEFENDANT
TECHNIFAB PRODUCTS, INC.;
COUNTERCLAIM**

29 Comes now the defendant, Technifab Products, Inc., (hereinafter referred to as
30 "Technifab"), and for its answer to the Complaint for Damages and Application for Permanent
31 Injunction of the plaintiff, Cryotech International, Inc., (hereinafter referred to as "Cryotech"),
32 states as follows:

Allegations of Jurisdiction, Venue and Parties

1. Technifab admits the material allegations contained within paragraph 1 of the Complaint.

2. Technifab admits that venue is proper in this district pursuant to 28 U.S.C. § 1391(c) and that Technifab has and does conduct business in the Northern District of California and is therefore subject to the personal jurisdiction of the Court. Technifab denies all other material allegations contained within paragraph 2 of the Complaint.

3. Technifab lacks knowledge or information sufficient to form a belief about the truth of the allegations contained within paragraph 3 of the Complaint, and on that basis so denies them.

4. a. Technifab admits the allegations contained within paragraph 4(a) of the Complaint.

4. b. Technifab lacks knowledge or information sufficient to form a belief about the truth of the allegations of paragraph 4(b) of the Complaint, and on that basis, so denies them.

4. c. Technifab denies the allegations contained within paragraph 4(c) of the Complaint.

4. d. Technifab denies the allegations contained within paragraph 4(d) of the Complaint.

Nature of this Case

5. Technifab admits that on September 10, 2001, Technifab and Cryotech's predecessor, VBS Industries Incorporated (hereinafter "VBS"), entered into an Exclusive Manufacturing and Distributor Agreement (hereinafter the "Agreement"). Technifab avers that the Agreement speaks for itself. Technifab denies all other material allegations contained within paragraph 5 of the Complaint.

6. Technifab denies the allegations contained within paragraph 6 of the Complaint.

Facts Common to all Claims

7. Technifab admits that the cryogenic supply industry is competitive and that Cryotech is engaged in the business of marketing, selling and distributing liquid nitrogen (LN2) transfer systems. Technifab denies all other material allegations contained within paragraph 7 of the Complaint.

8. Technifab admits that it entered into the Agreement with Cryotech and that Section 7 of the Agreement included provisions (a) through (j) entitled "Confidentiality Agreement."

1 Technifab further admits that a true and correct copy of the Agreement is attached to Cryotech's
 2 Complaint and marked as Exhibit A. Technifab denies all other material allegations contained
 3 within paragraph 8 of the Complaint.

4 9. Technifab would admit that the Confidentiality Agreement – *in its entirety* – provides
 5 as follows:

6 (a) Each party may have developed or acquired creative, technical,
 7 economic, and business information constituting trade secrets or intellectual
 8 property of that party (the "Information").

9 (b) TPI or VBS may, in each party's own discretion, provide to the
 10 other party access to that portion of the Information that may be useful to the other
 11 party for the purpose of complying with the provision of this Agreement.

12 (c) Each party shall maintain as confidential all Information of the
 13 other party which is made available to the other party and which is marked as
 14 "Confidential", or if provided in verbal form, is accompanied with a clear
 15 indication of confidentiality or followed within five (5) days of the date of verbal
 16 disclosure with a writing indicating the disclosure's confidentiality (the
 17 "Confidential Information").

18 (c) [sic] Neither party shall use the other party's Confidential Information,
 19 except for the purpose(s) stated herein, and shall not disclose Confidential
 20 Information to any third party, unless the prior written approval of the provider of
 21 the Confidential Information is received.

22 (d) Each party shall restrict access to the other party's Information to
 23 its agents or employees who have been identified by the party receiving the
 24 Information as requiring access to the Information to accomplish the purpose(s)
 25 stated herein.

26 (e) Should either party at any time be requested to do so, that party
 27 shall return to the other party the received Information and all other written
 28 information, models, drawings, photos, data, samples, and the like which the
 29 recipient may have received relating to the Information and all copies of the same
 30 or any portion thereof.

31 (f) Nothing contained herein shall in any way restrict or impair either
 32 party's right to use or disclose the other party's Information which: (a) is known
 33 to the public other than by breach of this Agreement; (b) is in the party's
 34 possession prior to the time of the disclosure to the other party and was not
 35 acquired, directly or indirectly, from the other party; or (c) is made available by a
 36 third party who has the legal right to do so.

37 (g) The terms of this Agreement shall not be construed to give either
 38 party a license under any patent, trademark, copyright or Confidential Information
 39 belonging to the other party.

40 (h) *For a particular Information, each party's obligation hereunder
 shall cease three (3) years from the date of disclosure of that particular
 Information.*

1 (i) A waiver of a breach of this Confidentiality Agreement shall not
2 constitute a waiver as to any further breach. The terms of this Confidentiality
3 Agreement may be enforced through any remedy available at law or in equity,
4 including injunctive relief.

(Emphasis added)

5 10. Technifab admits that during the course of the Agreement, Cryotech provided to
6 Technifab "Information" as that term is defined within Section 7 of the Agreement. This
7 Information included very limited specifications and drawings (in that the vast majority of the
8 products subject of the Agreement were designed and engineered by Technifab); and the names
9 of Cryotech's customers, and their contact information (in that Cryotech chose and directed that
10 Technifab "drop ship" most products subject to the Agreement – as well as products not subject
11 to the terms of the Agreement – directly to the purchaser). The vast majority of Information
12 provided by Cryotech to Technifab was not marked as "Confidential" or indicated as confidential
13 by follow-up writing, as required by Section 7(c) of the Agreement. Technifab denies all other
14 allegations contained within paragraph 10 and subparagraphs 10(a) through (d) of the Complaint.

15 11. Technifab denies the allegations contained within paragraph 11 of the Complaint, as
16 they pertain to Technifab. Technifab lacks knowledge or information sufficient to form a belief
17 about the truth of the allegation that Cryotech's information, trade secrets and proprietary
18 information were not generally accessible to third parties (other than Technifab), and so denies
19 same.

20 12. Technifab denies the material allegations contained within paragraph 12 of the
21 Complaint, as they apply to Technifab. Technifab lacks knowledge or information sufficient to
22 form a belief about the truth of the allegations of paragraph 12, as they pertain to third parties
23 and/or Cryotech employees, and therefore denies same.

24 13. Technifab lacks knowledge or information sufficient to form a belief about the truth
25 of the allegations of paragraph 13 of the Complaint, and on that basis so denies them.

26 14. Technifab admits that it informed Cryotech that it was maintaining a list of order and
27 delivery information for products ordered by Cryotech under the Agreement, for direct drop-
28 shipment to the purchaser. Technifab further admits that it informed Cryotech that it was

1 maintaining Cryotech's Information consistent with and pursuant to all terms of Section 7 of the
2 Agreement and was not violating same. Technifab denies all other material allegations contained
3 within paragraph 14 of the Complaint.

4 15. Technifab lacks knowledge or information sufficient to form a belief about the truth
5 of the averments of paragraph 15, and on that basis, so denies them.

6 16. Technifab lacks knowledge or information sufficient to form a belief about the truth
7 of the averments of paragraph 16, and on that basis, so denies them.

8 17. Technifab admits that on or about September 26, 2006, Cryotech's President, Gary L.
9 Sandercock, contacted Technifab's Vice President of Sales and Marketing, Douglas Short, to
10 complain that a Technifab sales representative was informing Cryotech customers that Technifab
11 manufactured Cryotech products. Technifab further admits that Mr. Short informed Mr.
12 Sandercock that Technifab would fully comply with the terms and provisions of the Agreement,
13 including all provisions of Section 7, Confidentiality Agreement. Technifab denies all other
14 allegations contained within paragraph 17 of the Complaint.

15 18. Technifab admits that on or about March 8, 2007, communications occurred between
16 Technifab's President, Stephen Short, and Mr. Sandercock, which communications were
17 believed to have been conducted by telephone and by email. During the telephone conversation,
18 Mr. Short advised Mr. Sandercock that he believed that Cryotech was improperly obtaining and
19 purchasing products subject to the Agreement from sources other than Technifab. Mr. Short
20 further informed Mr. Sandercock that Technifab had and would continue to honor and comply
21 with the terms and provisions of the Agreement, including Section 7, Confidentiality Agreement,
22 subject to its limitations contained within Section 7(h). Technifab denies all other material
23 allegations contained within paragraph 18 of the Complaint.

24 19. Technifab admits that it does have a sales representative working for it in Northern
25 California. Technifab lacks knowledge or information sufficient to form a belief as to when
26 Cryotech's President discovered the existence of this sales representative, and therefore denies
27 that allegation. Technifab denies all other material allegations contained within paragraph 19.

28 20. Technifab admits the material allegations contained within paragraph 20 of the

1 Complaint.

2 21. Technifab denies the material allegations contained within paragraph 21 of the
3 Complaint.

4 22. Technifab denies the material allegations contained within paragraph 22 of the
5 Complaint.

6 23. Technifab admits that Cryotech has had several communications with Technifab,
7 wherein Cryotech insisted that Technifab not tell Cryotech's customers that Technifab was the
8 manufacturer of
9 and had performed most of the design and engineering for the products sold pursuant to the
10 Agreement. Technifab denies all other material allegations contained within paragraph 23 of the
11 Complaint.

12 24. Technifab denies the material allegations contained within paragraph 24 of the
13 Complaint.

14 **First Claim**

15 **(Breach of Contract)**

16 25. That in response to paragraph 25 of the Complaint, Technifab hereby incorporates by
17 reference its answer to paragraphs 1 through 24, as if fully set forth herein.

18 26. Technifab denies the material allegations contained within paragraph 26 of the
19 Complaint.

20 27. Technifab denies the material allegations contained within paragraph 27 of the
21 Complaint.

22 28. Technifab denies the material allegations contained within paragraph 28 of the
23 Complaint.

24 29. Technifab denies the material allegations contained within paragraph 29 of the
25 Complaint.

Second Claim

**(Interference with Prospective Economic
Advantage Against Defendant)**

30. That in response to paragraph 30 of the Complaint, Technifab hereby incorporates by reference its answer to paragraphs 1 through 29 of the Complaint, as if fully set forth herein.

31. Technifab denies the material allegations contained within paragraph 31 of the Complaint.

32. Technifab denies the material allegations contained within paragraph 32 of the Complaint.

33. Technifab denies the material allegations contained within paragraph 33 of the Complaint.

34. Technifab denies the material allegations contained within paragraph 34 of the Complaint.

35. Technifab denies the material allegations contained within paragraph 35 of the Complaint.

Third Claim

(Misappropriation of Trade Secrets Against Defendant)

36. In response to paragraph 36 of the Complaint, Technifab hereby incorporates by reference its answer to paragraphs 1 through 36 of the Complaint, as if fully set forth herein.

37. Technifab lacks knowledge or information sufficient to form a belief about the truth of the averments of paragraph 37, and on that basis, so denies them.

38. Technifab lacks knowledge or information sufficient to form a belief about the truth of the averments of paragraph 38, and on that basis, so denies them.

39. Technifab denies the material allegations contained within paragraph 39 of the Complaint.

40. Technifab denies the material allegations contained within paragraph 40 of the Complaint.

41. Technifab denies the material allegations contained within paragraph 41 of the

1 Complaint.

2 42. Technifab denies the material allegations contained within paragraph 42 of the
3 Complaint.

4 43. Technifab denies the material allegations contained within paragraph 43 of the
5 Complaint.

6 44. Technifab denies the material allegations contained within paragraph 44 of the
7 Complaint.

8 **Fourth Claim**

9 **(Unfair Competition Against Defendant)**

10 45. That in response to rhetorical paragraph 45 of the Complaint, Technifab hereby
11 incorporates by reference its answer to paragraphs 1 through 44 of the Complaint, as if fully set
12 forth herein.

13 46. Technifab denies the material allegations contained within paragraph 46 of the
14 Complaint.

15 47. Technifab denies the material allegations contained within paragraph 47 of the
16 Complaint.

17 48. Technifab denies the material allegations contained within paragraph 48 of the
18 Complaint.

19 49. Technifab denies the material allegations contained within paragraph 49 of the
20 Complaint.

21 **AFFIRMATIVE DEFENSES**

22 **First Affirmative Defense**

23 **(Failure to State a Claim)**

24 All or some of Cryotech's claims against Technifab are barred in whole or in part by
25 Cryotech's failure to state a claim upon which relief can be granted.

26 **Second Affirmative Defense**

27 **(Election of Remedies)**

28 All or some of Cryotech's claims against Technifab are barred and precluded in whole or

1 in part by the doctrine of Election of Remedies.

2 **Third Affirmative Defense**

3 **(Unclean Hands)**

4 All or some of Cryotech's claims against Technifab are barred in whole or in part by the
5 doctrine of Unclean Hands.

6 **Fourth Affirmative Defense**

7 **(Estoppel)**

8 All or some of Cryotech's claims against Technifab are barred in whole or in part by the
9 doctrine of Estoppel.

10 **Fifth Affirmative Defense**

11 **(Failure to Mitigate)**

12 All or some of Cryotech's claims against Technifab are barred in whole or in part by
13 Cryotech's failure or failures to mitigate its damages, if any, resulting from any alleged wrongs
14 by Technifab.

15 **Sixth Affirmative Defense**

16 **(Waiver)**

17 All or some of Cryotech's claims against Technifab are barred in whole or in part by the
18 doctrine of Waiver.

19 **Seventh Affirmative Defense**

20 **(Laches)**

21 All or some of Cryotech's claims against Technifab are barred in whole or in part by the
22 doctrine of Laches by virtue of Cryotech's unexplained and unexcused delays which have and
23 will continued to result in significant prejudice to Technifab.

24 **Eight Affirmative Defense**

25 **(Frustration of Purpose)**

26 All or some of Cryotech's claims against Technifab are barred in whole or in part by the
27 doctrine of Frustration of Purpose. The purposes envisioned by and intended in the Agreement
28 were founded upon and required, in part, Cryotech's performance of its obligations under the

1 Agreement, the breach of which by Cryotech undermined the purposes for which the Agreement
2 was entered into.

3 **Ninth Affirmative Defense**

4 **(Failure of Performance)**

5 All of Cryotech's claims against Technifab are barred in whole or in part by Cryotech's
6 material failure to perform its duties and obligations under the Agreement.

7 **Tenth Affirmative Defense**

8 **(Failure of Conditions Precedent)**

9 All or some of Cryotech's claims against Technifab are barred in whole or in part by the
10 failure of conditions precedent, the occurrence of which are and were required in order to give
11 rise to Technifab's duty to perform as alleged, if at all.

12 **PRAYER FOR RELIEF**

13 Wherefore, Technifab prays for judgment as follows:

- 14 1. That judgment be entered against Cryotech and in favor of Technifab and that
15 Cryotech's Complaint be dismissed in its entirety;
16 2. For Technifab's attorneys' fees, litigation expenses and costs of suit herein; and
17 3. For such other and further relief as the Court deems just and proper.

18 Dated: July 31, 2008

HUNT, HASSLER & LORENZ LLP

19
20 By /s/ Mark D. Hassler
21 Mark D. Hassler
22 (appearance *pro hac vice*)

23 ROBINSON & WOOD, INC.

24
25 By /s/ Arthur J. Casey
26 Arthur J. Casey
27

COUNTERCLAIM

Pursuant to the Federal Rules of Civil Procedure, counter-claimant, Technifab Products, Inc., (hereinafter referred to as "Technifab"), for its counterclaim against the counter-defendant, Cryotech International, Inc. (hereinafter referred to as "Cryotech"), states as follows:

1. Technifab is a corporation organized under the laws of the State of Indiana, and having its principal place of business located in Brazil, Clay County, Indiana.

2. Technifab is informed and believes and thereupon alleges that Cryotech is a corporation organized under the laws of the State of Delaware and having its principal place of business located in the State of California.

3. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1441.

5. That on or about September 10, 2001, Technifab and Cryotech (by and through its predecessor, VBS Industries Incorporated) entered into an Exclusive Manufacturing and Distributor Agreement, a true and accurate copy of which is attached to Cryotech's Complaint herein and marked as "Exhibit A" (hereinafter referred to as the "Agreement").

6. That Section 1 of the Agreement provides in part as follows:

TPI [Technifab] hereby agrees to act as the exclusive manufacture of certain products to be sold and distributed by VBS which products are listed in Schedule 1-A and 1-B attached hereto (the "Products"); TPI shall manufacture the Products for sale to VBS for resale and distribution on a global basis. It is agreed that TPI shall be the sole source of supply for the Products listed in Schedule 1-A and 1-B to VBS and VBS agrees that it will not arrange for the manufacture of those Products covered by this Agreement by itself or any of its Affiliates or by any other person or entity so long as TPI is able to produce sufficient quality and quantities of the Products to VBS on a reasonable basis.

7. That in reliance upon the Agreement and specifically the promises and agreements of Cryotech contained within Section 1 thereof, Technifab incurred substantial expenses to increase its production volumes, including enlargement of its physical facility; the purchase of additional manufacturing equipment; the hiring of additional personnel; and the purchasing and stockpiling of inventory required specifically for the production of the products which are the subject of the Agreement.

8. Section 2(a) of the Agreement sets forth the following duty of Cryotech/VBS:

2. **Sales to and Duties of VBS**

(a) VBS shall use its best efforts to promote the sale of the Products and to solicit orders for the Products from customers on a global basis.

9. That Cryotech breached the Agreement with Technifab, in that it undertook to manufacture on its own and/or outsource and/or contract to third parties the manufacture of products for which Technifab was to be the sole source of supply. Throughout the life of the Agreement, Technifab has been able to produce sufficient quality and quantities of these products on a reasonable basis, as required by the Agreement, and that Cryotech's own manufacturing and/or outsourcing and/or contracting of the manufacturing of the products to third parties is without basis and is a breach of the promises made by Cryotech to Technifab within said Agreement.

10. That Cryotech has also failed to use its best efforts to promote the sales of the products and to solicit orders for the products as required by it under the Agreement. Through Cryotech's mismanagement, lack of adequate knowledge of the products in question, the lack of sales support and poor customer service, the sales of the products to be exclusively manufactured by Technifab and distributed by Cryotech under the Agreement had decreased by approximately 1.7 million dollars between the years 2006 and 2007, and has decreased by another 1.6 million dollars from 2007 through June of 2008.

11. That the decrease in sales of the products to be exclusively supplied and manufactured by Technifab under the Agreement is a direct and proximate result of Cryotech's breach of Sections 1 and/or 2(a) of the Agreement.

12. That Section 7(d) of the Agreement provided that each party thereto is to restrict access of the other party's Information (as defined with Section 7(a)), to only those agents or employees of the party receiving the Information, and then only to such agents or employees requiring access to the Information to accomplish the Agreement's purposes.

13. That as a part of its duties and obligations under the Agreement, Technifab provided to Cryotech technical specifications and drawings of the products which it supplied and manufactured under the Agreement, which specifications and drawings had been created and

1 prepared by Technifab, and which constituted trade secrets and intellectual property of
2 Technifab, and further therefore constituted "Information" under the Agreement.

3 14. That Cryotech, in violation of Section 7(d), provided or conveyed said technical
4 specifications and drawings to third parties, for purposes of securing other sources of supply and
5 manufacture of the products, in violation of Section 1 of the Agreement. Further, that Cryotech
6 improperly provided to third parties – and not as customers under the Agreement – products
7 designed, engineered and manufactured by Technifab under the Agreement, for the purpose of
8 having the third parties disassemble, cut apart and reverse-engineer said products, so that
9 Cryotech and the third parties could obtain the information and know-how necessary for
10 Cryotech and/or the third parties to manufacture Technifab's products, in violation of the
11 Agreement.

12 15. That pursuant to Section 4(c) of the Agreement, Cryotech agreed to pay Technifab its
13 invoices in full within forty-five (45) days of the invoice date. For at least the past several years,
14 Cryotech has systematically failed to pay Technifab's invoices in a timely fashion as required by
15 the Agreement.

16 16. That Technifab has and is continuing to perform its obligations and duties under the
17 Agreement, to the extent that it has been allowed to do so by Cryotech.

18 17. That as a direct result of the contractual breaches of Cryotech, as described above,
19 Technifab has suffered substantial money damages, including, but not limited to, its costs and
20 expenses which it incurred to meet and perform its obligations under the Agreement; the loss of
21 anticipated profits for those products which Technifab was unable to sell pursuant to the
22 Agreement as a result of Cryotech's breaches; the uncompensated loss of its technical
23 information and drawings to third parties, as a result of Cryotech's failure to comply with the
24 Confidentiality provisions of the Agreement; for interest, and for all other damages for which
25 Technifab is entitled to recover as a result of Cryotech's breaches.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, Technifab prays for a judgment as follows:

- 1 1. That judgment be entered in favor of the counter-claimant, Technifab Products,
- 2 Inc. and against the counter-defendant, Cryotech International, Inc., in an amount
- 3 which will fully and fairly compensate it for the damages which it has incurred as
- 4 a result of counter-defendant's breaches.
- 5 2. For Technifab's attorneys' fees, litigation expenses and costs of suit herein; and
- 6 3. For such other and further relief as the Court deems just and proper.

7 Dated: July 31, 2008.

8 HUNT, HASSLER & LORENZ LLP

9
10 By /s/ Mark D. Hassler
11 Mark D. Hassler
 (appearance *pro hac vice*)

12 ROBINSON & WOOD, INC.

13
14 By /s/ Arthur J. Casey
15 Arthur J. Casey